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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 803

THE SCOTT REALTY COMPANY,

Petitioner,

vs.

THE LASALLE & KOCH COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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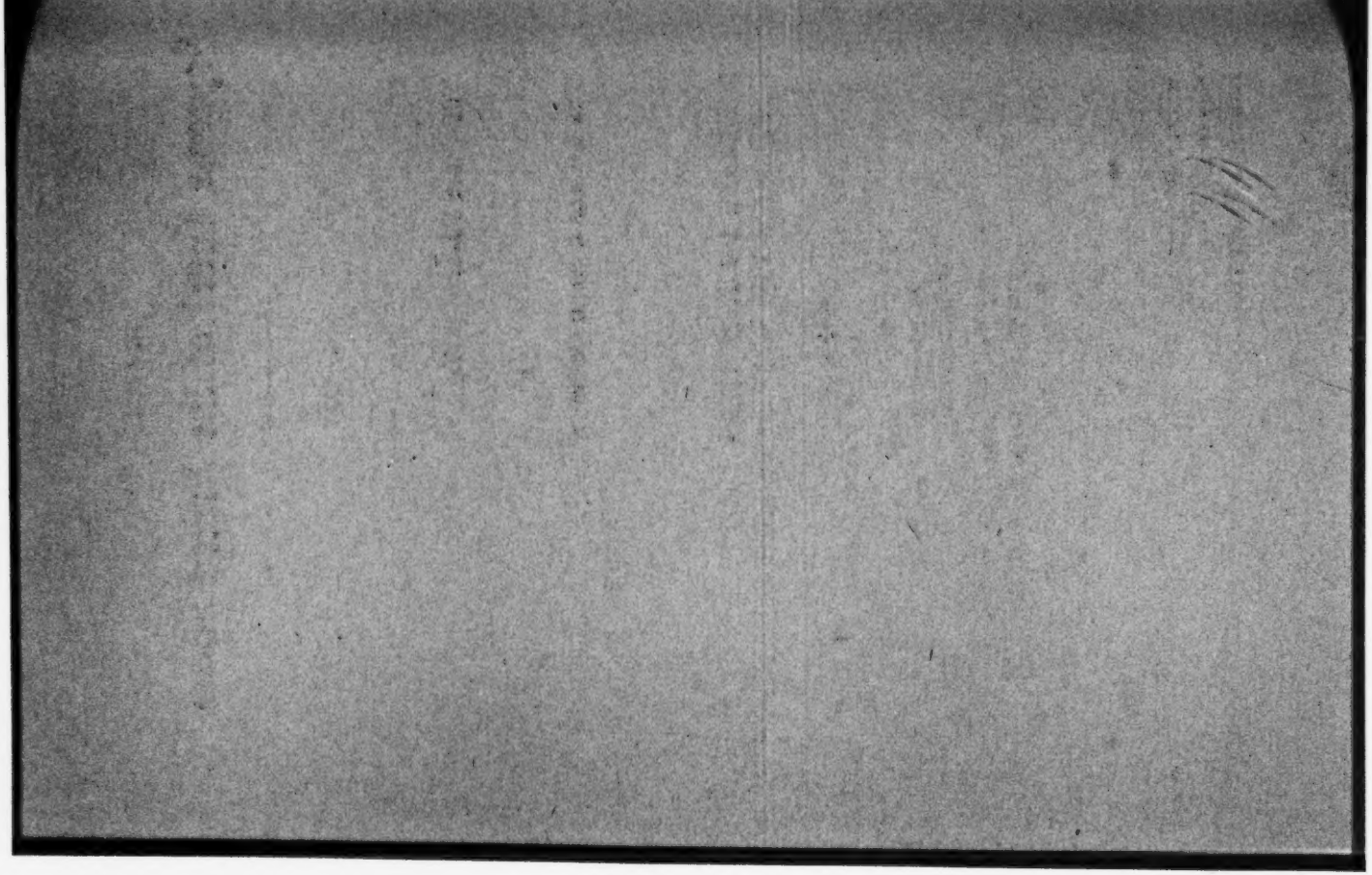

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Opposing counsel have filed an extremely short brief, which, we think, calls for a reply. This brief is accordingly filed pursuant to Rule 38, Paragraph 4(a).

THE CLAIM THAT THE PRINTED RECORD IS NOT COMPLETE

At pages 2, 3 and 4 of the opposing brief, it is said that the printed record on file in this Court is not the "complete record"; (p. 3) that it is only a "partial and deficient record"; (p. 3) that it was printed only for the "convenience" of petitioner's counsel and "as a part of

its brief in the Supreme Court of Ohio"; (p. 4) and that reference "particularly" to the "complete record" would show "that the facts as stated in petitioner's brief are inaccurate, misleading and incomplete." (p. 2) Counsel also say: "At no time has the respondent been given the opportunity to consider or determine the parts of the record that should be printed or filed in this case, as we believe is intended by the rules of practice in this court." (p. 3.)

These are grave charges, and they are false.

The printed record before this Court (Volumes I and II) is the record which was printed "for the use of the court below," namely, the Supreme Court of Ohio. This is shown by the certificate of the clerk of that court on file here. This printed record, including Volume III (Proceedings in the Supreme Court of the State of Ohio), has been filed in this Court in accordance with Rule 38, Paragraph 7. Volumes I and II were prepared in strict accordance with Rule IV of the Supreme Court of Ohio, which calls for the printing of "so much of the record, testimony and documents therein, as may be necessary to be considered by the Court."

In accordance with that Rule, a copy of the record so printed was furnished to opposing counsel forthwith, and proof of service was duly filed with the clerk of the Supreme Court of Ohio. Opposing counsel thus had full opportunity to object to the printed record as not being accurate or sufficient for the court below, but no objection of any kind was made. (R. p. 935.) As a matter of fact, Volumes I and II of the printed record on file here contain all of the proceedings in the Common Pleas Court and in the Court of Appeals, and all of the evidence which was before the Court of Appeals except that relating to the second cause of action (the issue of value), which the Court of Appeals found it unnecessary to consider.

THE CLAIM THAT THE CONSTITUTIONAL QUESTIONS CAN NOT BE CONSIDERED BY THIS COURT

On pages 4 and 5 of the opposing brief, it is stated that the constitutional claims "cannot be heard now" (p. 5), because petitioner did not claim a violation of its constitutional rights until the case got into the Supreme Court of Ohio, and that in that court petitioner "raised what it called a constitutional question by asserting it had been denied due process of law in that the appraisers had not granted or allowed to it a 'hearing'." (P. 4.)

In the first place, we wish to say that opposing counsel misconceive our position.

The denial of petitioner's right to due process of law does not rest upon the action or award of the *arbitrators*, or *appraisers*, because that did not involve the exercise of state power. It does rest upon the action of the Court of Appeals in upholding, sanctioning and enforcing the award, where no hearing had been granted, and upon its gross and obvious errors pointed out in our original brief, "coming close to the boundary of arbitrary action" (*Roberts, Receiver, vs. New York*, 295 U. S. 264).

The violation of petitioner's constitutional rights first appeared in the Court of Appeals, namely, in the arbitrary findings and judgment of that court.

The wholly unexpected and capricious action and decision of the Court of Appeals constituted the denial of due process to petitioner. The Common Pleas Court properly followed the decision of the Supreme Court of Ohio in the *Worthington* case and set aside the award because no hearing was accorded the parties, and for the other reasons set out in the second amended petition, but the Court of Appeals ignored the *Worthington* case, ignored the evidence, adopted findings without evidence, refused our request for special findings, refused to find the material pro-

bative facts, refused to answer interrogatories directed to the undisputed facts and matters of record, condoned the false statements and misrepresentations of respondent and its officers, and by its decree gave its judicial sanction to this outrageous award, taking away from petitioner the rents on $550,000.00 of value, the difference between the award and the fair value determined by the Court of Common Pleas.

We are, of course, familiar with the rule urged by opposing counsel, namely, that constitutional questions must ordinarily be asserted at the threshold. As with most general rules, there are exceptions to this one.

As stated by Mr. Justice Cardozo in *Great Northern Railway Co. vs. Sunburst Oil & Refining Co.*, 287 U. S. 358, at page 367 of the opinion:

> "* * * The rule, general as it is, does not extend to cases where the constitutional question, *however tardily raised, is considered and decided* (*Consolidated Turnpike Co. vs. Norfolk & O. V. Ry. Co.*, 228 U. S. 326, 334; *Cumberland Coal Co. vs. Board*, 284 U. S. 23), *nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. Brinkerhoff-Faris Trust & Savings Co. vs. Hill*, 281 U. S. 673, 678; *Missouri ex rel. Missouri Insurance Co. vs. Gehner*, 281 U. S. 313, 320; *American Surety Co. vs. Baldwin, supra.* * * *"

The fifth syllabus of that case is as follows:

> "5. A federal claim first raised by petition for rehearing in a state court is in time for purposes of review if the occasion for it arose unexpectedly from the grounds of the state court's decision."

The general rule contended for by counsel is subject to other exceptions. For instance, in the case of *Arrowsmith vs. Harmoning, Admx., et al.*, 118 U. S. 194, which was an appeal from the Supreme Court of Ohio, the question was raised for the first time in that court and was

not noticed in the opinion of that court. This Court held that it was timely under the circumstances of the case.

It is well settled that constitutional questions raised for the first time in the Supreme Court of the state are timely, and that the fact that such questions are not raised in the trial court is immaterial, *where the state court decided them. Sully vs. American National Bank,* 178 U. S. 289, 298; *Home Insurance Co. vs. Dick,* 281 U. S. 397, 407; *Schuylkill Trust Company vs. Pennsylvania,* 296 U. S. 113.

In the case of *Whitfield vs. Ohio,* 297 U. S. 431, 436, the constitutional questions were not raised in the trial court, but were raised in the Court of Appeals and decided. The Supreme Court of Ohio dismissed the petition in error, but this Court held that the assertion of the constitutional claims was timely and took jurisdiction.

In a number of cases the constitutional claims were first asserted on writs of error in the Supreme Court of the state, which was held to be timely and sufficient. *Rothschild vs. Knight,* 184 U. S. 334; *Meyer vs. Richmond.* 172 U. S. 82; *Farmers' & Merchants' Insurance Company vs. Dobney,* 189 U. S. 301; see also *International Harvester Company vs. Missouri,* 234 U. S. 199, 206.

In *Brinkerhoff-Faris Trust & Savings Company vs. Hill,* 281 U. S. 673, the constitutional claims were first asserted on a petition for rehearing in the Supreme Court of the state. The first syllabus of the case is as follows:

> "1. A federal claim first raised by petition for rehearing in a state court is in time for purposes of review here if it was raised at the first opportunity, even though the petition was denied without opinion."

In *Saunders vs. Shaw et al.,* 244 U. S. 317, it was held that:

> "A claim that a judgment of a state supreme court violates rights under the Fourteenth Amendment is not too late, though first made by the assign-

> ment of errors presented to its Chief Justice when the writ of error from this court was granted, if the aggrieved party was under no duty to anticipate the state court's action before the judgment was rendered and was afforded no opportunity afterwards to present the claim for its consideration."

It should be noted that the Supreme Court of Ohio *considered and decided the constitutional questions* in the instant case (R. p. 937). This Court has held that such a decision is "a decision of the case on the merits." *Van Huffel vs. Harkelrode, Treasurer,* 284 U. S. 225, 230.

Obviously the constitutional claims in the case at bar could not have been asserted, and there was no occasion to assert them, until the Court of Appeals had acted. Petitioner could not anticipate that the Court of Appeals would ignore the decision of the Supreme Court of Ohio in the *Worthington* case. Its action was wholly unexpected, and its decree constituted the exercise of state power which operated as a denial of petitioner's right to due process. The very earliest time at which the constitutional claims could have been asserted was in the notice of appeal and the assignment of errors, unless it be argued that they should have been included in the motion for a new trial. This would have been a vain thing because the Rules of Practice of the Court of Appeals make no reference to motions for new trial, and it is the settled practice of the Court of Appeals not to grant hearings.

It is clear that the constitutional claims were asserted at the first and only effective time possible.

THE CLAIM THAT THE FINDINGS OF THE COURT OF APPEALS ARE CONCLUSIVE

At page 5 of the opposing brief there is a recital of certain findings of the Court of Appeals, premised by the statement that in "any view the Court of Appeals of Ohio found as a fact that the lessor had a hearing." It seems a mockery to have opposing counsel ask this Court to treat those so-called findings as sacrosanct when they are, as shown in our original brief (pp. 29 to 33), not really special findings, but general findings mixed with conclusions of law, made without any evidence or directly contrary to the admitted or undisputed evidence.

THE CLAIM THAT THE WORTHINGTON CASE, 19 OHIO ST. 66, HAS BEEN OVERRULED

Opposing counsel at page 6 say that this was an appraisal proceeding and not an arbitration, and that the parties were, therefore, not entitled to a hearing before the appraisers. They also say:

> "That is the law of Ohio as decided by the Supreme Court of Ohio in *Royal Insurance Co. vs. Ries*, 80 O. S. 272 (1909), 88 N. E. 638, and by the Supreme Court of Ohio and the Court of Appeals of Lucas County, Ohio, in this case."

Reference to Shepard's Citator will show that the Supreme Court of Ohio has not overruled, or in any way qualified, its holding in the *Worthington* case, and that the arbitrators, or appraisers, in a case of this kind must afford the parties a hearing. In so holding the court says:

> "* * * *In so holding it is unnecessary to say whether the proceeding is to be regarded as an arbitration or not.* * * * *But we think it is a proceeding of that importance, and so liable to possible abuse, fraud, or mistake, that the parties to be affected thereby should have an opportunity to be heard.* * * *" (Opinion, p. 78.)

Royal Insurance Co. vs. Ries, 80 Ohio St. 272, relates to an entirely different situation. That case is discussed in our original brief at page 45. The *Ries* case does not purport to discuss or affect the doctrine of the *Worthington* case; indeed, that case is not even mentioned.

The Court of Appeals in the instant case did not purport to overrule or in any way affect the *Worthington* case. It did not even mention it. It simply circumvented that case by arbitrarily holding that the parties had materially modified and departed from the lease contract; that the two appraisers appointed by the parties became their respective agents and representatives; that the third appraiser became the umpire; and that the appraisal proceedings met the requirements of the lease "as expressly modified by the parties."

(Court of Appeals Opinion, original brief, p. 65.)

The Supreme Court of Ohio in the instant case did not purport to overrule or in any way affect the *Worthington* case. It simply dismissed the appeal as of right on the constitutional questions and overruled the motion to certify. The effect of overruling the motion to certify is stated by the Supreme Court of Ohio as follows:

> "When this court overrules a motion to certify a record, no precedent for the decision of later cases by this court is thereby established."
>
> (*Swetland Co. vs. Evatt,* 139 Ohio St. 6, 7, 2nd syllabus.)

> "As was said by Judge Jones in the case of *Village of Brewster vs. Hill,* 128 Ohio St. 343, 352, 190 N. E. 766:
>
> 'We have heretofore announced that, in cases knocking at our door for certification, the refusal of a motion to certify, even if the same legal question is decisively involved, does not furnish an

adjudication of the question by this court as an established precedent for future cases.' "

(*Swetland Co. vs. Evatt,* 139 Ohio St. 6, 18.)

CONCLUSION

In view of the foregoing, we respectfully submit that obviously the questions as stated on page 7 of the opposing brief (paragraph 4) are not the questions before this Court. The questions before this Court are simply these:

> Did not the Court of Appeals by its arbitrary findings and judgment and its other gross and obvious errors violate petitioner's right to due process under Section 1 of the Fourteenth Amendment, and was not the Supreme Court of Ohio gravely wrong in declining a review and in adjudicating the constitutional questions adversely to petitioner?

Respectfully submitted,

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